Supreme Court, U.S.
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No. 91-1210

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

BILL CLINTON, GOVERNOR OF ARKANSAS, *et al.*,
*Appellants,*

v.

M.C. JEFFERS, *et al.*,
*Appellees.*

**On Appeal from the United States District Court for the Eastern District of Arkansas**

## MOTION TO DISMISS

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## QUESTION PRESENTED

Whether the Court has jurisdiction over an appeal from a decision of a three-judge District Court awarding attorney's fees and costs to the prevailing plaintiffs in a voting rights case, where the jurisdictional statute authorizes a direct appeal to the Supreme Court only "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction," 28 U.S.C. § 1253 (1988).

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## MOTION TO DISMISS

Appellees move, pursuant to Sup. Ct. Rule 18.6, to dismiss the appeal on the ground that the Court lacks jurisdiction:

*Proceedings Below*

This is the third appeal in this case. The first two appeals challenged decisions of the three-judge District Court ruling on the merits of plaintiffs' voting rights claims.

Each of those appeals was taken from an order of the three-judge District Court granting an injunction. On the first appeal, No. 89-2008, the Court summarily affirmed the judgment of the three-judge District Court below. *Clinton v. Jeffers*, 111 S.Ct. 662 (1991), *affirming* 730 F. Supp. 196 (E.D. Ark. 1989) and 756 F. Supp. 1195 (E.D. Ark. 1990).[1] The defendants withdrew the second appeal, No. 90-394, after appellees filed a Motion to Affirm. 111 S.Ct. 1096 (1991).[2] This appeal involves a challenge to an order of the three-judge District Court, entered separately from the rulings on the merits and after the entry of injunctive relief

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[1]The lawsuit challenged the 1981 district lines for the Arkansas State House and Senate as violative of § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988), and the United States Constitution, and also contended that numerous instances of intentional discrimination by State and local officials justified placing Arkansas under pre-clearance procedures pursuant to § 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c) (1988). The District Court ruled in favor of plaintiffs on all but one of the legislative districts challenged under § 2 of the Voting Rights Act.

[2]The second appeal was from a subsequent opinion of the three-judge Court finding that a pattern of constitutional violations had occurred, which required placing the State under limited pre-clearance procedures. 740 F. Supp. 585 (E.D. Ark. 1990).

became final, awarding attorneys' fees to the plaintiffs-appellees.

In ruling on plaintiffs' request for an award of attorneys' fees,[3] the District Court concluded that this was a "mammoth case" and "a Herculean effort," requiring expenditure of enormous amounts of time and resources. J.S. App. A-5, A-7. The Court explained that the case "involved a cloud of witnesses and a mountain of exhibits," that "[e]xtensive expert testimony was required," and that "[i]t took [the] Court three opinions to consider and decide the many issues raised." J.S. App. A-7.[4] Despite the

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[3]In that request, plaintiffs voluntarily excluded approximately 900 hours of work performed on the litigation. J.S. App. A-6.

[4]The Court found that plaintiffs' challenge included "numerous legislative districts, covering approximately one-third of Arkansas." J.S. App. A-5. The Court also pointed out that defendants themselves had "recognized the magnitude of the case," noting "that the remedy, for example, 'involve[d] twenty-three of one hundred House districts and eight of thirty-five Senate districts [and] affect[ed] hundreds of thousands of voters in east and south Arkansas.'" J.S. App. A-7 (quoting Defendants' Motion for a Stay of Judgment Pending Appeal, No. 89-2008 (U.S., filed March 12, 1990), at 6.)

The case was so large and complex that the "expertise, energy and resources" to litigate it were "simply not . . . available" in the State of Arkansas. J.S. App. A-5. Therefore, the Court awarded

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enormity of the effort required, the District Court denied compensation for many of the hours devoted to the case by plaintiffs' attorneys and awarded hourly rates that in many cases are significantly below those requested. J.S. App. A-6, A-8, A-9.

The District Court found that in order to be "reasonable," the statutory fee must be sufficient "to attract competent counsel for meritorious cases." J.S. App. A-11. Therefore, the Court adjusted the lodestar upward by 50 percent to compensate for the contingent nature of the fee arrangement.[5]

The Court relied on extensive, undisputed evidence submitted by plaintiffs demonstrating that the "market" of attorneys in Arkansas willing to undertake representation in

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[4](...continued)
plaintiffs' out-of-town, co-lead counsel a rate that "may slightly exceed the local market rate for most top-notch lawyers." J.S. App. A-5.

[5]Defendants argue that "there was very little risk of loss for [appellees] in this case." J.S. at 6 n. 3. Defendants' prior statements contradict this assertion. For example, even after plaintiffs prevailed in the District Court, defendants argued that "reversal is the most likely result on appeal." Defendants' Motion for a Stay of Judgment Pending Appeal, No. 89-2008 (U.S., filed March 12, 1990), at 6.

racial discrimination cases is a crisis state.[6] Because

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[6]A prominent Little Rock Attorney stated:

> Virtually no attorneys in this area are willing to accept complex civil rights cases such as this one on a contingent fee basis since current awards to not provide a market incentive to attract competent counsel to do so. ... [I]n this district ... competent counsel have simply been forced by market pressures out of these cases and into more renumerative areas of practice.
>
> * * *
>
> It has been our experience that a number of attorneys in this geographic area who once were willing to accept civil rights cases on a contingent fee basis simply have found that it is economically impossible to survive in this manner.
>
> * * *
>
> It is my opinion that the fee awards in federal courts to prevailing plaintiffs in civil rights cases have been grossly inadequate to attract a sufficient number of competent counsel willing to take these cases so that prospective plaintiffs in these cases are able to secure counsel.

Decl. of R. Quiggle, Aug. 30, 1990, at 2-5 (¶¶ 3, 6, 12). Similarly, Little Rock Attorney John Walker explained:

> The willingness of attorneys as a group to accept civil rights cases is on a rapid decline. I regularly receive between five and ten calls per day from race discrimination victims who are in need of legal representation. In addition, each week my firm receives so many referrals of civil rights cases from other attorneys that we generally are unable to

(continued...)

adequate compensation for the risk inherent in a contingent fee case had not been consistently awarded in Arkansas, attorneys had fled this type of work. Plaintiffs' evidence showed that the attorneys who remained in this field of practice could not survive financially without adequate compensation for risk.[7] Plaintiffs' evidence conclusively

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[6](...continued)

> consult with most. The persons making referrals normally have nowhere else to send the prospective plaintiffs, and, in most cases, given the decline in attorneys accepting civil rights cases, I am unable to recommend another attorney. Of those prospective plaintiffs with whom I consult, I am forced to turn down many cases -- even very solid claims. ...
>
> * * *
>
> [T]here is presently no "market" for federal civil right cases, since federal judges in the past have simply decided the fee after the litigation was completed on an *ad hoc* basis. The only measure of "market" is the number of lawyers who will not accept the burdens of civil rights litigation, given this "market's" experience with fees awarded when cases have been successful.

Walker Decl., August 1990, at 4, 8 (¶¶ 6, 14).

[7]Plaintiffs' co-lead attorney, P.A. Hollingsworth, stated: "My law firm is currently on the brink of financial disaster because civil rights cases have represented a substantial portion of my docket in the past few years." Supp. Decl. of P.A. Hollingsworth, April 25, 1991, at 3, ¶ 2.

demonstrated that without compensation for risk, victims of racial discrimination in Arkansas would not be able to find legal representation.[8]

The Court made explicit findings of fact that the plaintiffs in this case experienced actual difficulty in locating competent counsel and that the relevant market compensates contingency cases as a class by enhancing attorneys' fees by two to five times the normal hourly billing rates. J.S. App. A-13. Even though the record more than justified the requested risk adjustment of 100 percent, the Court awarded only a 50 percent enhancement.

## THE COURT LACKS JURISDICTION OVER THIS APPEAL

Defendants-appellants claim that the Court has jurisdiction under 28 U.S.C. § 1253. J.S. at 2. Defendants cite no other basis of jurisdiction and plaintiffs are aware of no other jurisdictional basis.

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[8]The Lieutenant Governor of Arkansas, a prominent Arkansas attorney, stated: "Unless the market compensates for the economic risks of contingency fee cases, attorneys generally will not accept such cases." Decl. of Jim Guy Tucker, Aug. 30, 1990, at 2, ¶ 5.

The provision on which defendants base jurisdiction reads in its entirety as follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253 (1988). This provision on its face does not apply to an order awarding attorneys' fees and costs. An award of attorneys' fees and costs is not an interlocutory or permanent injunction.[9] The statute authorizes a direct appeal only from an order granting or denying an interlocutory or permanent injunction. Therefore, the statute does not provide jurisdiction over the order at issue in this appeal.

The Court has previously addressed the precise issue raised by this appeal and has unanimously concluded that

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[9]The Court has observed that an award of attorneys' fees is a collateral matter "uniquely separable from the cause of action to be proved at trial." *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 452 (1982).

there is no jurisdiction under 28 U.S.C. § 1253 over an independent appeal of an award of attorneys' fees. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 n.16 (1980), the Court explained: *"we would not have appellate jurisdiction under 28 USC § 1253 to decide the attorney's fee question had it alone been appealed."*[10]

Dismissal of this appeal for lack of jurisdiction is consistent with the concern previously expressed by the Court about the need to avoid mandatory jurisdiction over collateral matters, such as attorneys' fees. In interpreting 28 U.S.C. § 1252 (1988), a former basis of mandatory appellate jurisdiction, the Court stated: "[A] construction of § 1252 that would require us to review collateral issues coming to us as independent matters . . . would undermine the

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[10]In *Supreme Court of Virginia*, the Court took jurisdiction, under § 1253, of an appeal from the imposition of an injunction and also of the simultaneous appeal from an award of attorneys' fees. In finding jurisdiction over the attorneys' fee question, the Court relied on the "whole case" doctrine. Under the "whole case" doctrine, if the appeal is from an order granting or denying an injunction, the Court may also decide other issues in the case that are presented at the same time. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4040, at 157 & n.49 (1988).

effectiveness of the direct appeal provision. . . . [T]his Court would be required to give precedence to issues outside the congressional definition of public importance. We would, for example, be obliged to crowd our docket with appeals concerned solely with attorney's fee awards or pendent claims arising under state law." *Heckler v. Edwards*, 465 U.S. 870, 884-85 (1984).[11]

A long line of decisions holds that 28 U.S.C. § 1253 is limited to appeals from the grant or denial of an injunction. Attempted appeals from other types of orders must be dismissed for lack of jurisdiction. "Jurisdiction under the Three-Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purpose of Congress . . . to keep within narrow confines our appellate docket.'" *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (quoting *Phillips*

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[11]Section 1252 was repealed in 1988. Act of June 27, 1988, 100th Cong., 2d Sess., Pub.L. 100-352, § 1, 102 Stat. 662. Prior to the repeal of § 1252, the Court of Appeals for the Ninth Circuit ruled that a decision awarding or denying attorneys' fees is not directly appealable under 28 U.S.C. § 1252. *League of Women Voters v. FCC*, 751 F.2d 986 (1985).

*v. United States*, 312 U.S. 246, 250 (1940)). *See also Gunn v. Committee to End the War in Vietnam*, 399 U.S. 383, 387 (1970). "[O]nly a narrow construction [of § 1253] is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974) (footnote omitted).

Where no injunction was at issue, the Court has consistently dismissed appeals based on § 1253. For example, *Rockefeller v. Catholic Medical Center*, 397 U.S. 820 (1970)(per curiam), held: "The judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 USC § 1253." In *Gerstein v. Coe*, 417 U.S. 279 (1974)(per curiam), the Court dismissed, "for want of jurisdiction," an appeal from a declaratory judgment entered by a three-judge District Court, ruling: "Title 28 USC § 1253, under which this

appeal is sought to be taken, does not authorize an appeal from the grant or denial of declaratory relief alone." Similarly, in *Gunn*, the Court dismissed, for want of jurisdiction, an appeal taken under 28 U.S.C. § 1253, because the three-judge District Court had neither granted nor denied an injunction, but had merely written "a rather discursive per curiam opinion," 399 U.S. at 387.

In this case, the only issue presented in the Jurisdictional Statement is the award of attorneys' fees. The merits were finally determined in two prior appeals. Therefore, it is clear that the Court lacks jurisdiction over the instant appeal and that the appeal must be dismissed.

## CONCLUSION

For the reasons stated, the appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

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